

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BETH WILK)	
Claimant)	
VS.)	
)	Docket No. 190,312
TOOMEY, RUSSELL, GREGORY & PILGREEN)	
Respondent)	
AND)	
)	
FARM BUREAU MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from the Review and Modification of an Award entered by Administrative Law Judge Nelsonna Potts Barnes dated March 20, 1998. Oral Argument was held in Wichita, Kansas, on November 13, 1998.

APPEARANCES

Claimant appeared by her attorney, Dale V. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kim R. Martens of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Randall C. Henry of Hutchinson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability subsequent to the original award?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant originally suffered a work-related injury on or about April 15, 1994, which aggravated a preexisting degenerative disc disease. The Administrative Law Judge entered an Award on December 22, 1995, finding claimant's injury was only a temporary aggravation of her preexisting degenerative disc disease. The injury did not increase claimant's functional impairment, and the Administrative Law Judge found respondent responsible only for the temporary aggravation of claimant's injury.

On April 16, 1996, claimant filed a request for review and modification of the December 22, 1995, Award. The same Administrative Law Judge who made the original 1995 decision heard the matter and provided her opinion on March 20, 1998. The Administrative Law Judge denied claimant additional benefits, finding claimant had failed to prove a change in her condition, both from a functional and a work disability standpoint. The Administrative Law Judge found that the lack of change in condition was directly related to the original finding that claimant's injury in 1994 was only a temporary aggravation of a preexisting condition. Any increase in claimant's ongoing symptoms was a result of the degenerative disc disease and not the result of the April 1994 temporary injury.

In reviewing the evidence, the Appeals Board finds that the Review and Modification Award of the Administrative Law Judge should be affirmed.

Claimant was examined and treated by Dr. Thomas Kneidel, both before and after the review and modification was filed. Dr. Kneidel was also one of the original treating physicians at the time of the April 1994 injury. Dr. Kneidel has had the opportunity to testify on two separate occasions in this matter, and has examined and treated claimant over a period of several years. He felt the 1994 accidental injury resulted in a temporary aggravation of her underlying degenerative disc disease, and her current problem is a continuation of the basic underlying disease, with no relationship to the temporary aggravation.

Claimant argues that claimant's current condition is of a permanent nature, and requests that the denial of benefits stemming from the temporary aggravation finding from

1995 be revisited. In this instance, whether claimant's condition was temporarily aggravated or permanently aggravated constitutes a finding by the Administrative Law Judge in the original Award. While an award may be reviewed and modified, a finding may not. Hurst v. Independent Construction Co., 136 Kan. 583, 16 P.2d 540 (1932).

Claimant's vocational expert, Jerry Hardin, was also deposed both at the time of the original award and during the review and modification. In both instances, Mr. Hardin found claimant's work disability to be 89 percent as it relates to her ongoing degenerative condition. The Administrative Law Judge originally found claimant's work disability to be unrelated to this temporary aggravation, but instead related to a permanent degenerative condition which did not arise as a result of her work-related injuries.

A review and modification is not available where the finding upon which the award is based is of a past fact. Claimant's functional condition and her work disability are both past facts, existing at the time of the original award. Coffee v. Fleming Company, Inc., 199 Kan. 453, 430 P.2d 259 (1967).

In addition, Dr. Kneidel felt no additional work restrictions would be necessary at the time of the 1996 examination, and opined claimant had sustained no increase in her permanent impairment of function. The burden of proving a changed condition of the claimant is upon the party asserting it. Davis v. Haren & Laughlin Construction Co., 184 Kan. 820, 339 P.2d 41 (1959).

After carefully reviewing the medical records and testimony from the doctors and Mr. Hardin, the Appeals Board finds that claimant has failed to prove a change in her condition since April of 1994, and has further failed to prove that the cause of her ongoing symptoms is anything other than the underlying degenerative disc disease which was only temporarily aggravated by the 1994 incident. Therefore, the decision by the Administrative Law Judge denying claimant's request for a review and modification of the original Award is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification of an Award issued by Administrative Law Judge Nelsonna Potts Barnes on March 20, 1998, should be, and is hereby, affirmed, and the claimant is denied an increase in her Award from the original Award of December 22, 1995.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Deposition Services

Deposition of Thomas Kneidel, M.D.

\$149.50

Ireland Court Reporting	
Deposition of Beth Wilk	\$390.35
Deposition of Jerry D. Hardin	\$120.18
Deposition of Pedro A. Murati, M.D.	\$176.93

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Kim R. Martens, Wichita, KS
Randall C. Henry, Hutchinson, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director